BEFORE THE STATE BOARD OF EQUALIZATION

OF THE STATE OF CALIFORNIA

In the Matter of the Appeal of)
)
DAL HAYBRON)

For Appellant: Joseph Shemaria and
Joseph F. Walsh
Attorneys at Law

For Respondent: Mark McEvilly
Counsel

O P I N I O N

This appeal is made pursuant to section 18646 of the Revenue and Taxation Code from the action of the Franchise Tax Board in denying the petition of Dal Haybron for redetermination of a jeopardy assessment of personal income tax in the amount of $23,740.00 for the period entending from January 1, 1977 to September 28, 1977.

Appeal of Dal Haybron

The sole issue of the appeal is whether respondent's jeopardy assessment was reasonable.

The facts forming the basis of the jeopardy assessment are as follows. On September 28,1977, Detective Howard Velasco of the San Fernando City Police Department and Investigator Applegarth of the Los Angeles City Police Department arrived at the residence of one Patrick White after having received information that 50 pounds of Colombian marijuana was present at the residence and that a disagreement was taking place between White and two unidentified marijuana suppliers. The suppliers were described as two male Caucasians who had arrived at the residence in a Chevrolet automobile with a roof rack and Ohio license plates. As the two law enforcement officials arrived at the White residence, two individuals meeting the description of 'the suppliers exited the home and entered a parked Chevrolet with a roof rack and Ohio license plates. The driver, later identified as appellant, Dal Haybron, carried a briefcase into the vehicle. After the two drove away, the officers arrested Patrick White at the residence in the possession of approximately 50 pounds of Colombian marijuana.

After the arrest of White, the car driven by appellant was stopped for a traffic violation by another police officer. The officer, after being informed of White's arrest, escorted the Chevrolet and its occupants back to the White residence and upon searching the trunk of the vehicle, discovered the briefcase earlier carried by appellant as well as another briefcase belonging to appellant's passenger, Robert Barker. The briefcase determined to belong to appellant contained approximately $39,500.00 in cash and miscellaneous papers. Included among the papers were handwritten records and "buy notes" for apparent California marijuana sales contacts. There also was a receipt, in appellant's name, for an $8,500.00 cash.purchase of a sports car on September 24, 1977; the sports car was purchased in Pasadena, California.' On the basis of this evidence, appellant and his passenger were arrested on criminal charges of possession of marijuana for sale. (Subsequent to the filing of this appeal, appellant plead guilty to the charge of feloneous possession of concentrated cannabis.)

The, police notified respondent of appellant's arrest on September 28, 1977. Respondent.was also told that'records 'obtained at the time of the arrest showed

that, in a two-week period, appellant had sold approximately 731 pounds of marijuana, 100 pounds tit $315.00 per pound resulting in $31,500.00, and 631 pounds at an average of $375.00 per pound resulting in $236,625.00. Therefore, the police determined the total amount of drug sales was $268,125.00. The police also indicated, however, that of the total sales, only $170,832.00 had actually been received at the time of the arrest. The police supplied this information to responderit and additionally stated that an accomplice, Patrick White, was providing corroborating information as to appellant's sales activities. It was stated also that White had received a consignment of approximately 50 pounds of marijuana from appellant's distributor that same day.

Upon learning the above, respondent determined that appellant's marijuana dealings resulted in taxable California source income for the period January 1, 1977 through September 28, 1977. It was further determined that the collection of tax on appellant's income would be jeopardized in wholq or in part by delay. Based on the police supplied information, respondent estimated appellant's California source taxable income to be $117,000.00 during the subject period and issued a jeopardy tax assessment on September 28, 1977; in the amount of $10,310.00. Respondent's determination of the taxable income was reached by allowing appellant a cost of goods sold deduction of 31.5 percent ($53,832.00) of the $170,832.00 in previously mentioned actual receipts.

Later that same day, however, respondent had opportunity to conduct its own examination of the evidence, and as a result, determined that a revised.total taxable income of $224,000.00 was in order. A portion of the confiscated records referred to prior trips to California in April, May, June, July and August. Furthermore, accomplice White stated to respondent's representatives that appellant had already realized $250,000.00 in profit on seven pridr trips.to California during 1977. White also stated that appellant was a major marijuana dealer, active in California at least since February of 1977, and that he (White) had persdnally visited a warehouse appellant leased in San Diego for storage of the marijuana. White further stated that Haybron had often bragged about-ail the money he had made and all the fine hotels in which he had stayed. It was thereafter determined that if appellant had niade $250,000.00 profit on seven pridr sales trips to California, his profit per trip was at

least $35,714.00. On the basis of White's statements and the seized records, respondent estimated that appellant had made at least thr :e such prior trips, and on this basis determined that appellant had additional taxable California source income of $107,000.00 ($35,714.00 x 3 = $107,142.00).) Therefore, a second jeopardy assessment in the amount of $11,770.00 was issued on September 28, 1977. An "Order to Withhold" in this amount was served upon the police, and the total amount withheld, $22,080.00, was obtained from the police on the following day, September 29, 1977.

Subsequently, respondent discovered that the second jeopardy assessment reflected an incorrect spelling of appellant's surname and an incorrect tax amount. The correct tax amount was $13,430.00. Respondent therefore reissued the second assessment on October 18, 1977, reflecting the necessary corrections. An "Order to Withhold" for the portion of the corrected tax which had not been previously obtained, $1,660.00, was served upon the police but no funds were received.

Appellant petitioned for reassessment on October 11, 1977, after which time respondent attempted to gain additional information from appellant as to the amount of California income earned from the sale of marijuana. In response appellant submitted a financial statement and questionnaire on April 18, 1978, in which he declared taxable income of $40,600.00. On February 5, 1979, appellant filed a 1977 California nonresident personal income tax return in which he redeclared income of $40,600.00, but invoked the Fifth amendment with respect to the "business activity" and the "product" from which this income was earned. He also indicated on his tax return that he was present in California only from September 4, 1977 to September 28, 1977.' Appellant then sent respondent a demand letter requesting refund of $20,566.90 of the tax withheld. Respondent felt that the documents submitted by appellant were irreconcilable with the aforementioned evidence obtained by the police and therefore requested further explanation by appellant. Appellant responded by maintaining that he would "refuse to answer any questions concerning the books and records on the grounds that the answers may tend to incriminate him." Respondent thereafter affirmed its jeopardy assessments on July 30, 1979, from which action this appeal has been made.

Revenue and Taxation Code section 18641, which is substantially similar to comparable federal law, provides that if respondent, Franchise Tax Board, finds that either the assessment or the collection of tax may be jeopardized by delay, it may mail or issue notice of the finding to the taxpayer with a demand that the tax or deficiency declared to be in jeopardy be paid immediately. Respondent may also declare the taxable period of the taxpayer immediately terminated and demand the tax due for that period. (Rev. & Tax. Code, § 18642.)

Both the federal and state income tax regulations require each taxpayer to maintain such accounting records as will enable him to file a correct return (Treas. Reg. § 1.446-1(a)(4); Cal. Admin. Code; tit. 18, reg. 17561, subd. (a)(4).) If the taxpayer does not maintain such records, the taxing agency is authorized to compute his income by whatever method will in its judgment clearly reflect income. (Rev. & Tax. Code § 17561, subd. (b).) The existence of unreported income may be demonstrated by any practical method of proof that is available. (Davis v. United States, 226 F.2d 331 (6th Cir. 1955); Appeal of John and Codelle Perez, Cal. St. Bd. of Equal., Feb. 16, 1971.). Mathematical exactness is no't required. (Harold E. Harbin, 40 T.C. 373, 377.) Furthermore, a reasonable reconstruction of income is presumed correct, and the taxpayer bears the burden of proving it erroneous. (Breland v. United States, 323 F.2d 492, 496 (5th Cir. 1963); Appeal of Marcel C. Robles, Cal. St. Bd. of Equal., June 28, 1979.) The presumption is rebutted, however, where the reconstruction is shown to be arbitrary and excessive or based on assumptions which are not supported by the evidence. (Shades Ridge Holding Co., Inc., ¶ 64,275 P-H Memo. T.C. (1964), affd. sub nom. Fiorella v. Commissioner, 361 F.2d 326 (5th Cir. 1966).)

Appellant's position is that respondent's projection method of reconstructing his income is incorrect for several reasons. First, appellant argues that respondent's assessment of his income in excess of $200,000.00 was unreasonable in view of the fact that he held nonresident status previous to the time of his arrest and was present in California only for three weeks during the period in question. We do not agree.

The facts of this case support the conclusion that appellant was present in California on several occasions prior to the one that resulted in his arrest, and that on all these trips to California, he was

involved'in the sale of marijuana to a degree supportive of respondent's assessments. The factorssupporting this determination are the following: (1) statements by accomplice White that appellant had already realized $250,000.00 in profit on several prior trips to California; (2) statements made by White indicating that appellant sold only in California because the prices were better', coming out to the state once a month with up to 1,000 pounds of marijuana; (3) statements by White that appellant leased warehouse storage space in California to store the marijuana: (4) notations from appellant's notebook indicating that at least five prior major marijuana selling trips had been made by appellant to California during the appeal period; and (5) the cash purchase by appellant of an $8,500.00 sports car on September 24, 1977, in which transaction appellant gave a 'Pomona, California address. On the basis of these factors it was reasonable for respondent to reach the conclusion it did concerning the amount of appellant's income earned from California sources.

Appellant's next contention is that even if the $200,000.00 plus income exists and is taxable "in California, the entire amount should not be attributed to him. He argues that since other individuals were also arrested, the income should be allocated amongst all of them.' We disagree. Although there was certain inculpatory evidence against the other individuals arrested, the "buy notes" upon which much of respondent's assessment is based were found in appellant's briefcase, and thus linked specifically to him. Furthermore, White's unchallenged statements also attribute the income in question to appellant. Therefore, respondent's action in allocating the income entirely to appellant was not unreasonable and appellant has not brought forth evidence, presumably within his control, which would overcome the presumption of correctness attached to respondent's allocation.

A third argument advanced by appellant is that the information supplied by one of the arresting officers, Velasco, should be completely discredited due to the fact that a charge of embezzlement of public funds was later filed by the Los Angeles District Attorney's Office against Officer Velasco in connection with his alleged theft of a portion of the monies found in appellant's briefcase. We find no merit in this argument. The information used by respondent in calculating appellant's income was obtained almost entirely from sources independent of Velasco (i.e.,

appellant's own records plus White's statements). Moreover, the information provided by Velasco was completely corroborated by informant White's statements. For these reasons the question of Velasco's culpability in taking any funds is irrevelant to this (appeal.

Lastly, appellant contends that he cannot be required to make a correct reporting nor explainor interpret his seized records as such actions would confront him with "substantial hazards of self-incrimination." Again, this argument has no merit. A party's refusal to answer questions on the grounds of possible self-incrimination can give rise to an inference that a truthful answer to the question would have supported the opposing party's factual contentions. (Fross v. Wotton, 3 Cal.2d 384 [44 P.2d 350] (1935); Appeal of Russel H. and Tanya E. Racine, Cal. St. Bd. of Equal,,, April 17, 1963)

On.the basis of the foregoing, it is our opinion that the reconstruction of income made by respondent carried the presumption of correctness and appellant has not satisfied his burden of showing it to be incorrect. The information forming the basis of this reconstruction, such as dates and approximate number of sales trips made by appellant, were determined directly from appellant's own records. Respondent's estimation of the price received by appellant for the sale of the illegal goods and the determination of his profit was derived from appellant's records and from the information supplied by appellant's accomplice, Patrick White. Where appropriate, respondent allowed appellant a 31.5 percent cost of goods deduction. Appellant has failed to show any of these determinations to be erroneous.. We conclude, therefore., that respondent was justified in assuming that appellant was a major drug dealer and supplier whose income reasonably equaled the amount estimated.

Consequently, we find no basis for reversing. the action taken by respondent.

Appeal of Dal Haybron

O R D E R

Pursuant to the views expressed in the opinion of the board on file in this proceeding, and good cause appearing therefor,

IT IS HEREBY ORDERED, ADJUDGED AND DECREED, pursuant to section 18595 of the Revenue and Taxation Code, that the action of the Franchise Tax Board in denying the petition of Dal Haybron for redetermination of a jeopardy assessment of personal income tax in the amount of $23,740.00 for the period extending from January 1, 1977, to September 28, 1977, be and the same is hereby sustained.

Done at Sacramento, California, this 29th day of July , 1981, by the State Board of Equalization, with Board Members Mr. Dronenburg, Mr. Reilly, Mr. Bennett and Mr. Yevins present.

Ernest J. Dronenburg, Jr. , Chairman

George R. Reilly , Member

William M. Bennett , Member

Richard Nevins , Member

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